

Donald S. Edgar, Esq., SBN 139324
Jeremy R. Fietz, Esq., SBN 200396
Rex Grady, Esq., SBN 232236
EDGAR LAW FIRM
408 College Avenue
Santa Rosa, California 95401
Telephone: (707) 545-3200
Facsimile: (707) 578-3040

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

SETA SAAD and CHRISTIAN E. SAAD,
individually and as representatives of the
Estate of Raymond Saad,

Plaintiffs,

v.

GUIDANT CORPORATION; GUIDANT
SALES CORPORATION; CARDIAC
PACEMAKERS, INC.; BOSTON
SCIENTIFIC CORPORATION; ASHLEY &
MCMULLEN-WING SUN MORTUARY, a
business entity form unknown, ASHLEY &
MCMULLEN, a business entity form
unknown; and DOES 1 through 20,
inclusive,

Defendants.

Case No: C 08-00053-PJH

**REPLY IN SUPPORT OF MOTION
FOR REMAND**

Hearing Date: February 20, 2007

Time: 9:00 a.m.

Location: Courtroom 3, 17th Floor

Honorable Phyllis J. Hamilton

Removal Filed: January 4, 2008

**I. THE PLAINTIFFS' ARE ENTITLED TO A PRESUMPTION
IN FAVOR OF REMAND**

It should be remembered that Defendant has the burden of proof to establish the proper basis for removal. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). In this

1 case, the burden of proof is on defendant to prove that Ashley is a “sham” defendant
2 and the complete diversity rule does not apply.

3 The removal statute is to be strictly construed against removal, and when any
4 doubt as to the right of removal is shown, federal jurisdiction must be rejected. *Id.* at p.
5 566; see also Healy v. Ratta, 292 U.S. 263, 270 (1934). When a removal is challenged
6 by a motion to remand, facts must be *clearly demonstrated* in favor of removal,
7 otherwise significant doubts about its propriety must be resolved against removal.
8 Matter of Marriage of Smith, 549 F.Supp. 761 (W.D. Tex. 1982).

9 **II. GUIDANT’S ARGUMENTS FOR STAY ARE MISPLACED IN THE CONTEXT**
10 **OF THIS CASE (AND THE MOTION FOR REMAND)**

11 Guidant spends half its opposition brief arguing that the Court ought to stay these
12 remand proceedings and defer this issue to the MDL Court. Firstly, those are
13 arguments that ought to have been made in its motion to stay. Having made virtually no
14 arguments in its motion to stay, Guidant attempts to utilize their opposition to remand
15 brief to cure the utter lack of authority in their own motion. Plaintiff respectfully submits
16 that the arguments for stay are misplaced in the context of the motion for remand.

17 Irregardless, and as expected, Guidant focuses its arguments for stay upon the
18 flawed premise that leaving the remand issue to the Minnesota Federal Court somehow
19 promotes consistency and judicial economy. Plaintiffs addressed these anticipated
20 arguments in their Opposition to Motion For Stay. In the interests of true judicial
21 economy, the arguments will not be repeated in total here. Rather, it will be simply
22 pointed out that the motion for remand has been fully briefed, and if remand is
23 appropriate, it is an utter waste of judicial resources to thrust the issue upon another
24 federal Court hundreds of miles away, to force re-filing of the briefs, to force docket
25

1 clerks to book time, to force law clerks to research the issues, and to force the MDL
2 Judge to hear the motion that is ripe for decision here and now.

3 The only reasonable argument ever made in MDL cases, in favor of pushing
4 remand motions onto the MDL Court, is if there is a true risk of inconsistent rulings.
5 Cases in support of transfer before remand arise when the non-diverse defendant (or
6 like defendant) is likely to be present in other motions for remand from other districts.
7 For example, when a drug company such as Merck is sued for Vioxx liability and the
8 California distributor (McKesson) is also sued in various California courts, there is a
9 reasonable argument that inconsistency could arise. As McKesson is being hailed as a
10 California state court defendant by many plaintiffs in many jurisdictions there may be a
11 risk of inconsistency if one district judge finds them properly joined but another district
12 judge finds them fraudulently joined. Under such circumstances allowing the MDL
13 judge to sort it out may be reasonable. This is not such a case.

14 As discussed more fully in the Opposition to Motion for Stay, this case is unique.
15 The non-diverse defendant in this case is a mortuary with whom Guidant
16 representatives worked to facilitate Guidant's theft of the medical device from the
17 decedent's corpse. The California mortuary defendant (Ashley) is not present in any
18 other case in the MDL or in any district. Guidant has not alleged the presence of this
19 mortuary defendant, or indeed any mortuary or other corpse-robbing-related defendant
20 in any other Guidant case. This case is unique and the MDL Judge is in no better
21 position to rule on the motion for remand than is this honorable Court. There is simply
22 no possibility of inconsistency or any other sound reason to push this matter on to the
23 MDL court. The only reason to do so, not articulated by Guidant in its papers, would be
24 to facilitate Guidant's attempt to stall and delay this matter, and to facilitate Guidant's
25

1 attempts to avoid answering in a San Francisco Superior Court for its corpse-robbing
2 that occurred in San Francisco.

3 4 **III. GUIDANT'S FRAUDULENT JOINDER ARGUMENTS ARE MISPLACED**

5 As anticipated, and discussed in Plaintiffs' Motion For Remand, Guidant
6 continues to claim that Ashley (the mortuary) is "improperly joined". Their arguments
7 are entirely misplaced in the context of this case. In many ways, it is difficult to reply to
8 Guidant's opposition when the opposition fails to address the crux of Plaintiffs' Motion,
9 and, instead, continues to pretend that Guidant has nothing to do with the issues of
10 Ashley's potential liability. Unbelievably, Guidant maintains their arguments that the
11 claims against Ashley ought be severed, rather than the entire case remanded, because
12 the case against Ashley is so distinct from the case against Guidant. Guidant provides
13 no response to the facts and arguments made in the moving papers. Guidant does not
14 even address the pages and pages of Plaintiffs' brief that outlines the pages and pages
15 of allegations in the complaint which involve the joint tort-feasor relationship between
16 Ashley and Guidant.

17 It is absolutely incredible that no where in Guidant's papers do they deny, or
18 even address, the fact that a Guidant representative obtained access to the corpse of
19 decedent at the Ashley mortuary and then proceeded not just to test the device but
20 actually participated in carving the device out of the body and taking it away. Reading
21 Guidant's papers you would not even realize that such allegations were in issue in this
22 case. Guidant pretends that the only allegations against it are those of product liability.

23 Similarly, no where in Guidant's papers do they address the fact that their joint
24 tort-feasor liability is so intertwined with Ashley that Ashley has a filed cross-complaint
25 in this matter against them. Nowhere does Guidant address how, if there were a

1 severance, the Court could possibly address the cross-complaint by Ashley against
2 Guidant.

3 4 **IV. DEFENDANT ASHLEY HAS JOINED IN THE MOTION FOR REMAND**

5 While not dispositive, it is worth highlighting that Defendant Ashley has joined in
6 Plaintiffs' Motion for Remand and Plaintiffs' Opposition to Guidant's Motion for Stay. In
7 fact, in their joinder papers, Defendant Ashley acknowledges and asserts that it is in a
8 joint tort-feasor relationship with Guidant and that there has been no improper joinder in
9 this matter. Finally, Ashley raises the same queries about what would happen with their
10 cross-complaint against Guidant if this matter were somehow divided into two cases.

11 12 **V. PREDICTABLY, GUIDANT ARGUES THAT PLAINTIFFS' SUBMISSION OF A** 13 **SETTLEMENT CONSIDERATION FORM IS SOMEHOW RELEVANT... IT IS NOT**

14 In yet another predictable move, Guidant misrepresents the content of Plaintiffs'
15 settlement consideration form. Knowing that Guidant would misrepresent the import of
16 the form, Plaintiffs explicitly amended the form to add the following language:

17 *** The submission of this consideration form should in no way be viewed
18 as an acknowledgment that the MDL has jurisdiction over this case as the
19 Plaintiff believes jurisdiction lies only in the San Francisco County
20 Superior Court as there is a non-diverse defendant (Ashley & McMullen)
who is a joint tortfeasor with the Guidant defendants in the pending
litigation.¹

21 The submission of the settlement consideration form is only an indication that
22 one will consider the settlement. It is not even an expression of intent to participate. It
23 is worth noting to the Court that following submission of the form, a review of the
24 settlement documents reveals that there is no consideration in the settlement for the

25 ¹ See MDL Settlement Consideration form attached to the Supplemental Declaration of
Jeremy R. Fietz as Exhibit A.

1 types of claims relating to Guidant's corpse robbing/desecration (yet those actions
2 would be released). The fact that the proposed MDL settlement would force plaintiff to
3 utterly abandon (for no consideration) their multiple claims relating to the desecration of
4 their loved one, theft from the deceased's corpse, and the obvious spoliation issues
5 associated with that, must be another reason that Guidant so desperately wants to force
6 this case into the MDL.

7 Concerning potentially duplicative discovery between San Francisco and the
8 MDL regarding the product liability causes of action, Guidant could certainly bring a
9 motion before the San Francisco Superior Court to coordinate the product liability
10 discovery with the MDL (if one still exists at the time); however, the settlement
11 documents demonstrate that upon consummation of the settlement in the MDL, the
12 MDL court will dissolve the MDL and remand any and all remaining cases back to the
districts from whence they came (this case right back here to the Northern District).

13 After wasting this Court's time, the JPMLs time, and the MDL Court's time, the
14 case would be right back here again. Guidant's motivations are not judicial economy or
15 jurisprudential consistency. It is plain to see that the allegations against Ashley are not
16 separable from the allegations against Guidant and that federal jurisdiction is not
17 present.

18 **VI. THIS COURT HAS JURISDICTION OVER THIS MATTER UNTIL THE**
19 **TRANSFER TAKES EFFECT**

20 On January 28, 2008, the Judicial Panel Filed a Transfer Order of this and other
21 Guidant cases; however, the order explicitly states that the transfer:

22 order does not become effective until it is filed in the Office of the Clerk of
23 the United States District Court for the District of Minnesota. The
24 transmittal of this order to said Clerk shall be stayed 15 days from the
25 entry thereof. If any party files a notice of opposition with the Clerk of the

1 Panel within this 15-day period, the stay will be continued until further
2 order of the Panel.²

3 Plaintiffs have filed a Notice of Opposition to the transfer based upon the
4 impropriety of removal and to afford this Court ample time to hear and consider the
5 remand issue.³ As a result of filing the Notice of Opposition to the transfer, the JPML
6 will not transfer the case until after this Court has had an opportunity to consider and
7 rule on the motion for remand. Indeed the JPML Rules explicitly grant parties the right
8 to stay the transfer in order that parties have the right to address improprieties
9 concerning federal and/or JPML jurisdiction.⁴ Moreover, the JPML explicitly recognizes
10 that this Court may remand the matter and has simply asked to be notified of a remand
11 (presumably so they will know that the federal court no longer has jurisdiction).⁵ If this
12 Court grants Plaintiffs' Motion For Remand, Plaintiffs will promptly notify the JPML of
13 same.

13 VII. PAYMENT OF JUST COSTS AND FEES

14 Plaintiffs once again respectfully submit that this case warrants the payment of
15 "just costs" incurred because of Guidant's improper removal. Plaintiffs should not be
16 forced to bear the expense of dealing with the improper removal. Guidant's impropriety
17 is made even more clear by their complete and utter failure to respond to the principal
18 arguments made in favor of remand (the interconnectedness of the allegations against
19 Guidant and California defendant, Ashley). Guidant's pretense that it is uninvolved in
20 the allegations against Ashley underscore the improper removal.

21 _____
22 ² JPML Conditional Transfer Order is attached to the Supplemental Declaration of
23 Jeremy R. Fietz as Exhibit B.

24 ³ See Plaintiffs' letter Notice of Opposition dated February 4, 2008, attached hereto as
25 Exhibit C.

⁴ See JPML Rule 7.4 attached to the Supplemental Declaration of Jeremy R. Fietz as
Exhibit D

⁵ See letter from the JPML attached to the Supplemental Declaration of Jeremy R. Fietz
as Exhibit E.

1 Plaintiffs hereby request fees for the work expended in the preparation of this
2 motion, to which they are entitled under 28 U.S.C. 1447(c). The Code provides that:

3 ... An order remanding the case may require payment of just costs and
4 any actual expenses, including attorney fees, incurred as a result of the
5 removal.

6 As a result of the removal, Plaintiffs' counsel have now been required to file not
7 only the motion for remand and this reply but also the Opposition to the motion for Stay.
8 Plaintiffs' counsel Jeremy R. Fietz expended more than 15 hours in research and writing
9 in regards to remand and more than 15 hours in response to Guidant's motion for stay
10 of proceedings. Supplemental Declaration of Jeremy R. Fietz, Esq.. His reasonable
11 hourly rate is \$250.00. Plaintiffs reasonably seek an order for \$7500 for "just costs...
12 including attorney fees, incurred as a result of removal."

13 VIII. CONCLUSION

14 For the forgoing reasons and those stated in the moving papers, Plaintiffs
15 respectfully request that this Court immediately grant plaintiffs' motion for remand, and
16 grant them attorney's fees in the amount of \$7500.

17
18 Dated: February 4, 2008

19
20 
21 By: Jeremy R. Fietz, Esq. (State Bar No. 200396)
22 EDGAR LAW FIRM
23 408 College Avenue
24 Santa Rosa, CA 95401
25

PROOF OF SERVICE

I am employed in the City and County of Santa Rosa, State of California. I am over the age of 18 and not a party to the within action. My business address is 408 College Avenue, Santa Rosa, California 95401. On February 4, 2008, I served the foregoing document(s) described as:

REPLY IN SUPPORT OF MOTION TO REMAND

on the interested parties by placing () the original (X) a true and correct copy thereof in a sealed envelope addressed as follows:

Dana N. Gwaltney, Esq.
SHOOK HARDY & BACON LLP
333 Bush Street, Suit 600
San Francisco, CA 94104-2828
Telephone: 415/544-1900
Facsimile: 415/391-0281

Merrilee C. Miller, Esq.
LAW OFFICES OF WILLIAM J.
DIFFENDERFER
One Market, Spear Tower, Suite 2150
San Francisco, CA 94105
Telephone: (415) 348-4150
Facsimile: (800) 914-3772

**Attorneys for Guidant Corporation,
Guidant Sales Corporation; Cardiac
Pacemakers, Inc., and Boston
Scientific Corporation**

**Attorneys for Cathay Mortuary Wah
Sang Inc. dba Ashley & McMullen
Mortuary**



VIA OVERNIGHT MAIL:

VIA : By delivering such documents to an overnight mail service or an authorized courier in an envelope or package designated by the express service courier addressed to the person(s) on whom it is to be served.



VIA U.S. MAIL:

I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice such envelope(s) would be deposited with the U.S. postal service with postage thereon fully prepaid, at Santa Rosa, California.



FEDERAL:

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the state of California that the above is true and correct and was executed on February 4, 2008


JEREMY R. FIETZ